

BRB No. 06-0569

WILLIE L. MATTHEWS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 01/30/2007
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard E. Huddleston,
Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY
and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2003-LHC-02591) of Administrative Law Judge Richard E. Huddleston rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. Claimant worked for employer as a rigger beginning in 1980. On November 1990, he was removing metal scraps from staging equipment under an elevator when he injured his back. Claimant sought treatment with Dr. Hardy, who performed surgery in 1990 and in 1991. Claimant returned to work with restrictions that precluded his performing his former duties as a

rigger. Claimant's first assignment post-injury involved "staging equipment," and he also worked as a toolkeeper, tracking the tools and issuing them to the riggers for their use. Claimant later was assigned to the hose shop where he fixed air lines and air hoses. Subsequently, claimant attended "forklift school" and, after receiving his certification, began working as a forklift operator. Employer paid temporary total disability benefits prior to claimant's return to work and temporary partial disability benefits thereafter. In 1994, the district director issued a compensation order based on the parties' stipulations awarding claimant temporary total and partial disability compensation for various periods, as well as an ongoing award of temporary partial disability benefits of \$21.06 per week commencing January 13, 1996. In 1999, employer voluntarily converted claimant's payments to permanent partial disability benefits. Employer filed a motion for modification on June 17, 2003, contending that claimant no longer has a loss in wage-earning capacity due to an inability to work overtime. 33 U.S.C. §922.

On modification, the administrative law judge considered the claim for continuing permanent partial disability benefits based on a loss in overtime.¹ He found that claimant submitted the hours of overtime worked by three riggers in the period after claimant's injury, but he found that these documents reveal a wide disparity in the amount of overtime worked. He thus concluded that they could not be used to calculate claimant's loss in overtime. In addition, the administrative law judge found that claimant is working virtually the same amount of overtime post-injury as he did pre-injury. Therefore, the administrative law judge found that claimant has no current loss in wage-earning capacity and he denied benefits. The administrative law judge also found that any future loss in wage-earning capacity is too speculative, and he thus denied claimant *de minimis* benefits.

Claimant appealed the denial of benefits. In its decision, the Board held that the evidence of the hours of overtime worked by three employees with the same qualifications as claimant is adequate evidence from which the administrative law judge could determine a figure that represents claimant's loss of overtime hours. *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0881 (Aug. 22, 2005)(unpub.) (McGranery, J., concurring). The Board also held the administrative law judge erroneously rejected claimant's alternate contention that a comparison between his pre-injury overtime hours and his post-injury overtime hours provides a basis for an award based on a loss of wage-earning capacity. The Board stated that merely because the hours of overtime worked before and after the injury were "virtually" the same does not establish that claimant does not have a loss in wage-earning capacity. Accordingly, as

¹ The parties stipulated that claimant is entitled to permanent partial disability benefits of \$21.06 per week for the period between August 14, 1998, and December 31, 2001.

claimant submitted evidence from which the administrative law judge could determine a loss in wage-earning capacity due to a reduction in overtime hours, the Board vacated the administrative law judge's finding that claimant failed to establish a post-injury loss in wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h). The case was remanded for the administrative law judge to determine a dollar figure representing claimant's loss in overtime due to his work-related injury.²

On remand, the administrative law judge accepted the parties' stipulation that claimant had an average weekly wage of \$468.24 at the time of his injury in November 1990. The administrative law judge found that claimant regularly worked overtime prior to his work injury and that claimant's average weekly wage incorporated his overtime earnings. The administrative law judge found that claimant's actual wages since January 2002 are representative of his post-injury wage-earning capacity. The administrative law judge found that claimant had a post-injury wage-earning capacity in 2002, after adjusting it to his pre-injury hourly rate, of \$491.50 and, therefore, no loss of wage-earning capacity, but that the wages claimant earned in 2003 and 2004 establish an adjusted wage-earning capacity of \$461.16. The administrative law judge found that claimant therefore sustained a weekly loss of wage-earning capacity of \$7.08 commencing January 1, 2003, and he was awarded continuing compensation of \$4.72 per week. 33 U.S.C. §908(c)(21), (h).

On appeal, claimant challenges the administrative law judge's finding that the wages and hours of overtime worked since January 2002 by three employees with the same qualifications as claimant do not establish his post-injury wage-earning capacity. Claimant thus maintains he has a higher loss of wage-earning capacity. Employer responds, urging affirmance of the award of benefits.

Under Section 8(c)(21) of the Act an award for permanent partial disability is based on two-thirds of the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). It is well established that the party contending that the employee's actual post-injury earnings are not representative of his residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See*

²In her concurrence, Judge McGranery agreed that the case must be remanded, but she opined that the administrative law judge must determine in the first instance whether the evidence is sufficient to establish a loss of wage-earning capacity.

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Thus, for a claim alleging a loss of overtime, it is claimant's burden to establish that his actual post-injury wages are not representative of his post-injury wage-earning capacity and that his injury caused him to lose otherwise available overtime. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

In his decision on remand, the administrative law judge found that claimant's actual post-injury wages fairly and reasonably represent his post-injury wage-earning capacity. The administrative law judge found that the amount of overtime worked from 2002 to 2004 by three comparable riggers establishes only that overtime remained available in claimant's pre-injury job. The administrative law judge rationally rejected the testimony of employer's representative, Mr. Spicer, that foremen attempt to assign overtime evenly among the workers given the extent of the discrepancy between the amounts of overtime worked by these riggers. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge found there is no evidence of the amount of overtime these men worked in the years preceding claimant's 1990 work injury.³ Thus, the administrative law judge rationally declined to rely on the overtime hours of these co-workers to determine claimant's loss of wage-earning capacity.

The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). In this case, we hold that the administrative law judge acted within his discretion in crediting claimant's actual post-injury wages, including his overtime wages, as representative of his post-injury wage-earning capacity as claimant did not offer evidence to the contrary. The administrative law judge specifically found there is no evidence that claimant's current position as a forklift operator is temporary or that claimant cannot perform the work, and that claimant is capably performing a necessary function for employer. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). Moreover, the administrative law judge rationally found that a separate loss of wage-earning capacity for only overtime is

³ We reject claimant's contention that the administrative law judge should have drawn an adverse inference against employer regarding the number of overtime hours worked by Mr. Overton, Mr. Elam and Mr. Lassiter during the years preceding claimant's work injury on the basis that employer provided the work records of these riggers in response to claimant's discovery request. Claimant did not raise this argument before the administrative law judge. Claimant's Brief at 15-22; *see generally Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

not required where claimant worked overtime both before and after his injury. *See Brown*, 23 BRBS 110. Rather, a comparison of claimant's average weekly wage to his post-injury wage-earning capacity, both of which encompass overtime, will yield a figure determining whether he sustained a loss due to his injury. *See generally Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's award of permanent partial disability benefits of \$4.72 per week commencing on January 1, 2003. *See Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in part, cert. denied*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge